1972

Inga-Lill Elton v. Utah State Retirement Board, An Agency of the State of Utah : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

INGA-LILL ELTON,
Plaintiff-Respondent,

vs.

UTAH STATE RETIREMENT BOARD, an agency of the STATE OF UTAH,
Defendant-Appellant.

Case No. 12809

BRIEF OF APPELLANT

Appeal from a judgment of the Third District Court
for Salt Lake County
Honorable Ferdinand Erickson, Judge

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STATEMENT OF THE NATURE OF THE CASE

This case is an appeal to the district court from an administrative ruling of the Utah State Retirement Board denying a widow's pension to the widow of the late Judge Leonard W. Elton.

DISPOSITION IN LOWER COURT

The Third District Court, Judge Ferdinand Erickson presiding without a jury, heard the case de novo and ruled in favor of the widow's claim and against the Utah State Retirement Board.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the decision of the district court and an order affirming the decision of the Retirement Board.

STATEMENT OF FACTS

Judge Elton died the morning of May 13, 1970, from a stroke (55:19). At the onset of the fatal stroke he was at home in his bedroom preparing to dress himself (92:21). His most recent prior physical activity had been assisting his wife with the measurement of a staircase (92:20). He had spent more than normal time at home that morning, since the prior day he had announced his decision in an important case, the Sunday closing case, and he felt he was entitled to an extra hour (92:16). He would have commenced a jury case that morning at 11 o'clock a.m. at the courthouse but for the stroke (92:13).

Judge Elton had a history of cardiovascular disease. On February 4, 1954, while a practicing attorney, he underwent a physical examination including an ekg (42:29). The examination disclosed heart disease (42:25), and specifically a recent heart attack (43:3) of a moderately serious nature (59:7). Judge Elton was skeptical that he had had a heart attack (59:8) and in fact told the doctor he was nuts (43:8). Some twelve years later, in 1966, Leonard Elton was appointed district judge in the Third Judicial District.

The events leading up to the stroke were the following: Sometime in the summer of 1968, Judge Elton had episodes of dizziness (51:26). On January 9, 1969, he suffered a severe stroke as a result of which he was hospitalized for a period of nine days, from January 9 through January 17, 1969 (44:15; 45:13, 26; 62:3-14; 63-1-10). Following release from the hospital he was totally disabled for a period of one or two months (31:3). He then began to return to work beginning with an hour a day and increasing his work to two hours, and gradually working up to a full day's work by October 3, 1969 (84:16; 47:24). At first, his attending physician, Dr. Robert M. Dalrymple, made home visits (65:24-30), but later he set up a visit schedule for Judge Elton, one visit a month (48:22) and put the patient on a vaso-dilator type machine, the purpose of which was to dilate the blood vessels so that they would carry more blood, even though they might be partially blocked (66:8-16).

Judge Elton became presiding judge of the Third District in January 1970 (31:26). Although one of his duties in that capacity was the assigning of cases to other judges, he was a conscientious judge, as are all of the judges in that district (18:26), and he retained for decision by himself some difficult cases in which there was considerable public interest, although there were other sensitive cases handled by other judges on the court at the same time (37:6-10).

Judge Elton had a propensity for cardiovascular and cerebral vascular disease, and it was likely that one stroke might be followed by another (66:1). He began to fail

somewhat in March 1970 (49:15-28; 51:9-14), and on April 21st he had another disabling stroke which required him to cease working (54:3). By May 2, 1970, he still was not well (54:26), but by May 9th he seemed to have improved somewhat (55:8). On May 12th he rendered his decision on the Sunday closing case, which was one of the sensitive cases he had been in the process of deciding, and he suffered the fatal stroke on May 13th.

ARGUMENT

POINT I.

JUDGE ELTON DIED AS THE RESULT OF A DISEASE AND NOT AS THE RESULT OF AN ACCIDENT.

The pertinent statute is part of the now repealed Judges Retirement Act, Sec. 49-7-4 Utah Code Annotated 1953. It states: ". . . and the widow of every judge who is killed by accident arising out of or in the course of his employment, wheresoever such injury occurred, shall be entitled to the . . . widows' pensions . . . provided for in this Act." The vital part of the statute, the quoted language, was apparently taken verbatim from the Utah Workmen's Compensation Act, Sec. 35-1-45, U.C.A. 1953. That act provides compensation for the death of every employee who is killed ". . . by accident arising out of or in the course of his employment, wheresoever such injury occurred, . . ." In view of the identity of language, it seems probable that workmen's compensation decisions will provide the best criteria in interpreting the meaning of the Judges Retirement Act. Before moving to a discussion of the cases, however, it is instructive to

consider the testimony of Dr. Dalrymple who testified in behalf of the plaintiff, and also the testimony of the plaintiff herself. From that it will be clearly seen that the plaintiff did not meet her burden of proof.

Judge Elton had his heart attack at the time he was a practicing lawyer, in 1954 or shortly before. The heart attack probably was caused from an occlusion of a blood vessel, and that is the same kind of condition that apparently caused Judge Elton's stroke (59:22). The blood vessels become thickened and filled with a yellow-gray calcified material, a kind of sludge which attaches itself to the inner lining of the vessel (59:26). The heart attack occurred some twelve years before Judge Elton was appointed to the District Court bench and some sixteen years before he became presiding judge and before he undertook the decision of the two "sensitive" cases which are much alluded to in the plaintiff's testimony. The causative condition, the plugging of the vessel, is a vascular disease (52:6-20). It is this underlying condition, the vascular disease, that causes the death of the stroke patient (58:17-21). And in the case of stroke patients, death may come while a person is driving a car or home in bed or reading the newspaper or doing anything else (58:23-27). There was no question in Dr. Dalrymple's mind but that the stroke in January of 1969 was caused by a cerebral thrombosis, and there was no question in his mind but that death in the following year was caused likewise from a cerebral thrombosis (70:14-17). In order to confirm his findings, Dr. Dalrymple had Judge Elton examined by a neurologist at the time of the first stroke and while he was a patient at St. Mark's Hospital (61:17-29); 62:25

to 63:10). There is entirely absent from the record any testimony about weighty or sensitive cases under consideration by Judge Elton at the time of the January 1969 stroke.

Dr. Dalrymple testified that although cardiovascular disease is a part of the normal aging process, it was rather advanced in Judge Elton's case (64:6). He testified that it is sometimes aggravated by diet and physical condition (64:8). He further testified that the underlying condition, the occlusion of the blood vessels, did not occur suddenly but had built up over a period of time (68:16-23). He also testified that the autopsy showed evidence of previous damage to the brain, a softening and changes in the tissues which he described as necrosis or destruction of the tissue. He stated that the brain tissue at the base of the brain showed degenerative changes, and some of these showed cysts containing fluid which evidenced to him damage of long standing (70:30 to 71:16). He testified that there is nothing in the profession of district judges that increases the likelihood that one will have a stroke and that although people who work under a lot of pressure have a high incidence of vascular diseases, this is not limited to the sedentary type occupations, but could occur just as readily in a man who works with his hands (74:1-18). In conclusion of his cross-examination, Dr. Dalrymple testified that what happened in Judge Elton's case happens quite frequently with stroke patients, that if they have a prospensity for the disease they may have one stroke followed on by another, which may or may not be fatal, and that what happened in Judge Elton's case is typical of the syndrome rather than unusual (75:17-29).

When plaintiff's counsel asked Dr. Dalrymple about causal connection between the stress of Judge Elton's work as a judge and his death, he would not say that there was a causative relation. The record, on direct examination, runs like this:

> Q. Well, the question is, do you have a medical opinion as to whether or not the stress as you have described was apparent during the two months prior to Leonard Elton's death had any effect upon the underlying vascular disease?
>
> A. This certainly is a matter of professional opinion. I wouldn't want to pretend to give any definite authoritative opinion on this.
>
> Q. Well, give us your medical opinion as a doctor, if you have one.
>
> A. Well, I think it is well established that people who have an underlying disease could have it aggravated by stress.
>
> Q. Do you have an opinion as to whether or not there was aggravation in this case involving Judge Elton?
>
> A. In view of the historical set up and the symptoms of stressful situations, I would say it did.
>
> Q. Do you have a medical opinion as to whether his aggravation was or was not related to his death on May 13, 1970?
>
> A. I can't answer that directly, sir. All I could say in my opinion I think it would have been a contributing factor.
>
> Q. Can you state whether or not this contributory factor had any effect so far as causing his death at that particular time? In other words,

bringing on the onset of his death or triggering his death.

A. *If it was a contributing factor, it would be contributing t o the underlying condition, but I do not think it caused the underlying condition.*

Q. I understand that, but acting on the underlying condition, do you have an opinion as to whether or not this aggravation hastened his death?

A. In my own humble opinion from purely historical finding, *something aggravated it and that seemed to be the principal factor at that time.* (Emphasis added).

That testimony is consistent with what Dr. Dalrymple said later in cross-examination, referred to previously, that anyone can have a stroke in just about any place at any time doing anything.

POINT II

THE PRIOR DECISIONS OF THIS COURT REQUIRE SOME WORK - RELATED INCIDENT OR ACCIDENT.

Under the recent decisions of this court, some identifiable work-related incident, or *accident,* is required in order to bring a death or injury within the provisions of the Workmen's Compensation statute. This construction of the Act seems eminently logical and reasonable. The purpose of the legislation was to place on industry the burden of caring for those men, or their dependents, who are injured or killed on the job from the hazards of the job. The unexpected, unforeseen *accident* is and always has been the focal point of the legislation.

In *Redman Warehousing Corp. v. Industrial Commission,* 22 U.2d 398, 454 P.2d 283 (1969) this court considered a claim from a truck driver who had driven a load of furniture to San Francisco and returned. He had a prior history of back trouble. He noticed some pain in his back together with radiating pain to his leg at a truck stop along the way. In San Francisco he helped unload the van along with others. The pain persisted on the return trip to Salt Lake. He was later hospitalized and had surgery for a herniated disc. The Industrial Commission adopted the finding of a medical panel that sitting and driving the truck precipiated the difficulties which led to the applicant's operation. On the basis of the record this court rejected the Commission's finding, saying:

> There is nothing in this record that shows any unusual event, or "accident," if you please, justifying compensability within the nature, intent or spirit of the workmen's compensation act. To conclude otherwise would insure every truck driver, every railroad engineer, every airplane pilot, and a lot of others, against a physiological malfunction or physical collapse of any of hundreds of human organs, completely unproven as to cause, but compensable only by virtue of the happenstance that the malfunction, collapse or injury occurred while the employee was on the job, and not home or elsewhere.
>
> For aught we know from this record there may have been any number of reasons why the rupture occurred when and where it did, based on circumstances quite foreign to the claimant's employment. In other words there is a complete absence of competent proof here to support *any* finding with respect to the *cause* of the rupture, save

> by guesswork. In other words the claimant has not met the onus of proving the "accident" in the course of his employment that "caused" the "injury" of which he complains, which burden is his. As a matter of fact the record reflects that up to the time of the pain's inception, applicant was doing exactly what he had been doing continuously for 11 years prior thereto, and his own testimony clearly negated any theory of causation by merely "sitting and driving," or of a pre-existing condition that was lighted up by the "mere sitting and driving" on a highway with which the applicant was familiar and which was pretty good.
>
> In concluding that the circumstances in this case did not constitute an "accident" that *caused* an "injury" in the workmen's compensation sense, we point to several of our own cases and other authorities.

The case first cited at that point by this court is ***Pintar v. Industrial Commission,*** 14 U.2d 276, 382 P.2d 414 (1963). Here, the claimant alleged that he had suffered injuries to his back while working in a coal mine. On disputed evidence the Commission denied an award and the denial was affirmed. This court said:

> It is, therefore, a prerequisite to compensation that his disability be shown to result, not as a gradual development becauss of the nature or condition of his work, but from an identifiable accident or accidents in the course of the employment. There being substantial evidence to support the Commission's finding to the contrary, no basis exists upon which this court could rule that its denial of compensation was capricious and arbitrary. Accordingly, its order is affirmed.

Another case quoted in the *Redman* decision is *Carling v. Industrial Commission,* 16 U.2d 260, 399 P.2d 202 (1965). The claimant in that case suffered a loss of hearing, and upon application to the Commission he was denied any relief. He then sought review of the order. This court noted in its report of the case that claimant had a long prior history of deficient hearing running back as early as fourteen years before the incident which he claimed caused his loss of hearing. From the evidence, it appeared that other doctors who had examined him and his records stated that they were of the opinion that there had been a gradual and continuous regression of his hearing, and that this was not the usual pattern of a hearing loss suffered in the way he claimed his loss had occurred. Before going to the merits of the case, this court discussed the underlying purpose of the Workmen's Compensation Act. It said:

> The Workmen's Compensation Act, Section 35-1-45, U.C.A. 1953, provides for an award to an employee "* * * who is injured * * * by *accident* arising out of or in the course of his employment * * *." There is no further definition of the term "accident," but this court has held that for the purpose of the Act it should be given a broad meaning. It connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. We recognize the correctness of plaintiff's contention that even though there must be some such "accident" within the meaning of the statute, this is not necessarily restricted to some single incident which happened suddenly at one particular time and does not preclude the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such manner

> as to properly fall within the definition of an accident as just stated above. However, such an occurrence must be distinguished from gradually developing conditions which are classified as occupational diseases and which are not compensable except as provided in Chapter 2 of Title 35 (Sections 35-2-1, et seq.), U.C.A. 1953.

In affirming the denial of the claim, court further said:

> Inasmuch as there is a reasonable basis in the evidence to support the Commission's conclusion that the plaintiff's loss of hearing did not result from a single incident, nor from an "accident" arising out of or in the course of his employment, its order cannot be said to be capicious or arbitrary.

The opinion in *Redman* also refers to *Mellen v. Industrial Commission,* 19 U.2d 373, 431 P.2d 798 (1967), in which the claimant, a roofer, suffered severe chest pains while on the job and had to be hospitalized. On disputed evidence the Industrial Commission denied his claim and the denial was affirmed. The testimony in favor of the plaintiff rom his personal physician was that his exertion could have been a factor in hastening what was inevitable anyway, but he admitted that what occurred to the claimant could have occurred at any time, any place, even while he was asleep.

The claimant in *Redman* relied on three cases, *Baker v. Industrial Commission,* 17 U.2d 141, 405 P.2d 613 (1965), *Jones v . California Packing Corp.,* 121 U. 612, 244 P.2d 640 (1952), and *Purity Biscuit Co. v. Industrial Commission,* 115 U. 1, 201 P.2d 961 (1949). This court

pointed out that the *Jones* decision was a 3-2 decision with a strong dissenting opinion by Chief Justice Wolfe, who was an authority on Workmen's Compensation. It also pointed out that the *Purity Biscuit* case was a 3-2 decision and that Justice Wolfe's concurring opinion there sounded more like a dissent. In fact, it quoted from that concurring opinion as follows:

> In this type of case we are dealing with situations involving death or disability which situations may, due to a functional failure, occur by reason of the work or may be purely coincidental with it. Where the death of disability occurs under such circumstances as to present prima facie doubt as whether it was caused by exertion incidental to the work, or an event which occurred only in the duration of the work and in regard to which the work furnished no material or efficient concurring or cooperating cause, then, before a favorable award is made, it should appear by clear and convincing evidence that the exertion in pursuance of the work was at least an efficient cooperating cause of the disability or death. The commission should have clear and convincing proof that the exertion done as a part of the work, whether ordinary or extraordinary, was a factor which materially contributed to or caused the death or disability. Unless the commission requires clear and convincing proof that the disability was employment connected, that is, materially contributed to by the work performed, we may open wide the door to compensating nonemployment connected death or disabilities which the act was not intended to cover. This rule I suppose is primarily one of guidance for the commission. It would seem that unless no reasonable mind could say that the evidence was clear and convincing, the commission could not be overturned for arbitrariness.

In the *Mellen* case, the court cited *Burton v. Industrial Commission,* 13 U.2d 353, 374 P.2d 439 (1962), in which the Supreme Court sustained the denial of an award where decedent had suffered severe chest pains while doing delivery work for his employer. He was taken by ambulance to the hospital and died that afternoon. The cause of death was diagnosed as coronary thrombosis with myocardial infarction. The Commission had denied an award on the ground that death did not result from an accident arising out of or in the course of deceased's employment. The court pointed out:

> In response to the question as to whether the deceased's exertion in lifting and delivering the cases of beer was a contributing cause to the occurrence of Mr. Burton's heart attack, the doctor answered that, "It could be a factor."

In this case the applicant had the duty to prove by a preponderence of the evidence that the decedent died as the result of an accident caused by his employmnt or resulting from his employment. The evidence before the court not only does not preponderate in favor of the applicant but actually runs the other way. The evidence is that Judge Elton had a cardiovascular condition which in all probability had caused the earlier heart attack and which was clearly the cause of his recent strokes. It would not have mattered what he had been doing or where he was at the time the blood vessel to his brain was plugged. His stroke would have occurred no matter where he was and no matter what he was doing, and his occupation had nothing to do with it, other than that there was undoubtedly some physical attrition resulting from his work just

as there is in any occupation under any circumstances to any person. The Workmen's Compensation Act, and the Retirement statute we are here concerned with which is patterned after the Workmen's Compensation Act, were not intended to recompense an employee or his dependents where there is no *accident* arising out of or in the course of the employment. The fact that a medical doctor may choose to refer to a stroke as a cerebral vascular accident does not make that occurrence an *accident* within the meaning of the statutes under consideration. That medical term is something entirely different from a Workmen's Compensation term. There was no accident here which would justify an award.

POINT III

JUDGE ELTON'S STROKE DID NOT ARISE OUT OF, OR OCCUR IN THE COURSE OF HIS EMPLOYMENT.

To justify an award, not only must there have been an accident causing death but it must have been one "arising out of or in the course of his employment." The Workmen's Compensation program, and in this case the Judges' Retirement Act, were not designed to provide compensation, even if there were an accident, unless the employee at the time was engaged in his employer's business. Preparations at home to go to work have never been compensable, and indeed even the act of traveling to the employer's place of business is not compensable. In fact, in one recent case, *Lundberg v. Cream o'Weber/Federated Dairy Farms, Inc.*, 24 U.2d 16, 465 P.2d 175 (1970), the court said:

> Notwithstanding what has been said in those cases, it is fundamental that even though the employee may not be at a regular place of work, he must be performing a duty for his employer, or one which is so connected with his employment as to be an essential part thereof, so that the mandate of the statute is met that there must be an "accident arising out of or in the course of employment."

To the same effect is the decision in *Askren v. Industrial Commission,* 15 U.2d 275, 391 P.2d 302 (1964), in which the employee was using a cafeteria maintained by an independent contractor on the employer's premises. Although the court found that the eating activity was an integral part of her employer's business and advantageous to the employer, it stated the general rule in this fashion:

> The essential thing is that there be some substantial relationship between the activity engaged in and the carrying on of the employer's business. That is, it should be of such a nature that it may reasonably be assumed that it would be of some benefit or advantage to the employer in the operation of his business or the advancement of his interests.

A case in which compensation was awarded is *State Insurance Fund v. Industrial Commission,* 15 U.2d 363, 393 P.2d 397 (1964). Here the court found that the corporate employee had gone to one office and although he had returned to his apartment for breakfast, he had left from there to go to another office, and it held that he was in the course of his employment. The court said: "It is not necessary to refer to the numerous cases in which this court has held that an employee is not covered by the

Workmen's Compensation Act while going to or from work. Certainly, if Mr. Sander had merely arisen that fatal morning, had his breakfast, and then left his apartment to drive to the west-side office, we would have no problem — his death would not be compensable."

An earlier case, *M & K Corporation v. Industrial Commission,* 112 U. 488, 189 P.2d 132 (1948), contains an informative discussion of what is required to bring an accident within the phraseoolgy, "arising out of or in the course of" the employment. At Page 134 this court said:

> The distinction being that in order for an accident to arise out of the employment a more definite and closer causal relationship is required than is necessary for an accident to arise in the course of the employment but in the latter a closer relationship must exist as to time and place and as to the nature and type of work being performed. In other words the requirement that the accident arise in the course of the employment is satisfied if it occurs while the employee is rendering service to his employer which he was hired to do or doing something incidental thereto, at the time when and the place where he was authorized to render such service. Current Trends in Workmen's Compensation by Horovitz, on what constitutes "arising out of" commencing at page 507, and 666.
>
> However, where a disease is involved, even under the liberal provisions of our statute, we have refused to open the door to a recovery for all injuries, without any causal relationship between the employment and the accident, merely because the accident occurs on the premises of the employer during the hours of employment while the employee is rendering the service or something incidental thereto for which he was hired. Dee Me-

morial Hospital Ass'n v. Industrial Commission, 104 U. 61, 138 P.2d 233; Robertson v. Industrial Commission, 109 U. 25, 163 P.2d 331; see also Horovitz's Current Trends in Workmen's Compensation pages 666 to 668, where the author justifies the above requirement even where it is only necessary that the accident arise in the course of the employment on the ground that the statute only requires compensation insurance and not health insurance.

On the morning of his fatal attack Judge Elton did nothing in furtherance of his work as a judge. He had enjoyed a relaxed breakfast. He and his wife had perused the newspaper accounts of his decision rendered the day before. He had been in a relaxed and jovial mood. He was taking an extra hour to get to court. He assisted his wife in measuring some stairs for a new carpet. He was dressing at the onset of the fatal stroke.

All of these activities are purely personal. There is no decision known to counsel whether in the state of Utah or elsewhere which would award compensation under these circumstances. Larson, *Workmen's Compensation Law,* 1971 reprint, at Sec. 720 expresses it this way:

> At the other extreme are origins of harm so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment. If the time has come for the employee to die a natural death, or to expire from the effects of some disease or internal weakness of which he would as promptly have expired whether he had been working or not, that fact that his demise takes place in an employment setting rather than at home does not, of

> course, make the death compensable. Or if the employee has a mortal personal enemy who has sworn to seek him out whenever he may be, and if this enemy happens to find and murder the employee while th e latter is at work, the employment cannot be said to have had any causal relation to the death. The same is true if the employee, for reasons of his own, carries a bomb in his bosom (as actually happened in one case), and if the bomb goes off during business hours.

This case is not even as strong as the case put by Larson, because the death of Judge Elton did not take place in an employment setting. His place of employment was the courthouse; the stroke came on while he was at home. His work was to hear and decide legal questions and to perform activities related thereto; his stroke came on while he was at home doing what any other man might have been doing who could control his own time in some degree and who felt that he was entitled to an extra hour to relax of a given morning.

SUMMARY

The Workmen's Compensation laws and the language of the Retirement Act patterned after them were not intended to compensate all persons who suffer any injury or who die anywhere doing anything at any time. Such a construction would have to be put upon these statutes in order to award compensation to the claimant in this case. There was no identifiable incident or accident. The judge was not at his place of employment. He was not performing judicial work. The mischief which would re-

sult from a construction of the language of these statutes awarding compensation under these circumstances is apparent.

The decision of the district court awarding a pension should be reversed, and the order of the Utah State Retirement Board denying a pension should be reinstated.

Respectfully submitted,

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